



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 355 OF 2011

CROPKING FISH HATCHERY LIMITED.....1ST PLAINTIFF

PETER JOHN HEWITT &

JAMES NDUNGU GACHOKA T/A CROP KING FISH FEEDS.....2ND PLAINTIFF

VERSUS

BENSON MAINGI KARIUKI1ST DEFENDANT

CROP KING FISH FEEDS LIMITED.....2ND DEFENDANT

RULING

By a Notice of Motion dated and filed on 7th December 2011 under a Certificate of Urgency (*hereinafter referred to as "the Application"*), the plaintiffs (*hereinafter called the applicants*) sought the orders following: -

- (1) That for reasons to be recorded, this application be certified as urgent, service be dispensed with in the first instance and the same be heard on a priority basis,
- (2) That pending the inter partes hearing of this application the defendants be restrained from:-
 - (a) Manufacturing, breeding, selling distributing or in any other way dealing with fish and fish products using the plaintiffs' machines, plant and equipment.
 - (b) Taking payment from the people and institutions who have already taken fish and fish products from the plaintiffs and who are due to make payment to the plaintiffs.
 - (c) Taking payment for any fish and fish products manufactured and sold to the plaintiffs' existing clients using the plaintiffs' machines, plant and equipment.
- (3) That pending the inter partes hearing of this Application the defendant be restrained from using the name Crop King Fish Feed Limited to manufacture and sell fish feed and fish product to the plaintiffs customers.
- (4) That pending the inter partes hearing of the application the court does issue a mandatory injunction to compel the defendants to open the factory situate on KAMUZU BANDA STREET L.R.

NO. 3/979 and grant the plaintiffs access to the factory to enable them continue operating.

(5) That pending the hearing and determination of this suit the court confirms orders in terms of prayer No. 2, 3 and 4 above.

As the Application was in the first instance brought and heard ex parte, orders 1 and 2 thereof were granted on 7th December 2011 with a further order that the application be heard *inter partes* on 15th December 2011. In the event the application was not heard on that date. It was heard on 25th January 2012 by which date the 1st Respondent had filed a Replying Affidavit sworn on 20th January 2012, and opposing the application in its entirety.

As the Respondent's counsel opposed the application on the grounds inter alia that it (*the Application*) did not comply with requirements of Order 40 of the Civil Procedure Rules 2011, and further as the application was premised upon the provisions of that Order 40, rules (1)(2) and (3) and Section 1A, 1B and 3B of the Civil Procedure Act (*Cap. 21, Laws of Kenya*), and further because of the nature of the arguments advanced by counsel for the applicants, I set out on the outset the provisions of Order 40 rules (1), (2) and (3) aforesaid.

In summary rules (1) and (2) set out instances relating **firstly** to property (rule 1), and **secondly** to breach of contract (rule (2)) in which the court may grant temporary injunctive orders. Those instances are -

(1) where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, or

(2) the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, or

(3) where the Defendant threatens to breach or continue breaching a contract or injury complained of, or any kind of injury arising out of the same contract or relating to the same property or right.

If these situations are present in an application, the court may under the said rules (1) and (2) of the said Order, grant such injunction, on such terms as to the inquiry as to damages, the duration of the injunction, the keeping of accounts, giving of security or otherwise as the court deems fit.

In the instant application, the dispute is not over any property being wasted, damaged or alienated or being wrongfully sold by the Defendants/Respondents. The dispute is not also over any property which the Defendants threaten or intend to remove or dispose in circumstances affording reasonable probability that the Applicants will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendants in the suit.

The dispute in the instant suit is about the breach or threatened continued breach of contract, and acts of bad faith perhaps amounting to deceit and fraud perpetrated by a fellow shareholder and director of a company in which the 2nd plaintiff and the 1st defendant are members.

The facts are not disputed. The first plaintiff is a limited liability company duly registered under the Companies Act (*Cap. 486, Laws of Kenya*), and holder of Certificate of Incorporation Number CPR/2010/24236 dated 5th June 2010. The subscribers and therefore shareholders in that company are -

(1) Benson Maingi Kariuki - the 1st Defendant who is a subscriber to 3,000 ordinary shares,

(2) Peter John Hewitt the 2nd plaintiff and is a subscriber to 3000 ordinary shares,

(3) Joseph Wanyiah Mwangi - who is not a party to this suit, but is a subscriber to 3000 ordinary shares, and

(4) James Ndungu Gachoka - the 2nd plaintiff along with Peter John Hewitt, who is a subscriber 1000 ordinary shares in the 1st plaintiff.

There is also no dispute that Benson Maingi Kariuki and Peter John Hewitt and James Ndungu Gachoka are registered under the Registration of Business Names Act (*Cap. 499, Laws of Kenya*), under Certificate of Registration BN/2011/116057, as carrying on business under the business name of - "**CROP KING FISH FEEDS**". The Certificate was issued on 4th January 2011 and a year after issue of the Certificate of Incorporation of the 1st Plaintiff.

It is also a matter of common agreement that the parties hereto, (*plaintiffs and defendants*) following the incorporation of their company, and registration of the business name, got into the business of fish feeds and fish products.

The Applicants claim that in the course of transacting business the plaintiffs acquired business both under the name **Crop King Fish Feeds and Crop Fish Hatchery Ltd**, the registered offices of both plaintiffs being in Nakuru. This means that any time goods are delivered under the name **Crop Fish Hatchery Ltd or Crop King Fish Feeds**, the association is with Nakuru, and that this situation lasted for a period of about one year.

However on or about 7th December 2011, a disagreement arose between the owners of the 1st plaintiff and the 2nd plaintiff, the three natural persons - **Benson Maingi Kariuki, Peter John Hewitt, and James Ndungu Gachoka** on the manner of running the company following the delivery of a consignment of goods to a client, and the 1st Defendant (*Benson Maingi Kariuki*) chased away his two colleagues from the manufacturing premises.

Upon investigation his colleagues later discovered that the first defendant had incorporated a company called CROP KING FISH FEEDS LTD which was very similar to the business name CROP KING FISH FEEDS, the business name owned by the 1st Defendant and his two colleagues. This is not denied by the 1st Defendant who in paragraph 15 of his Replying Affidavit sworn on 10th January 2012, depones -

15. That the business carried out by the 2nd Defendant is independent and it has not in any way interfered with the plaintiff's business."

Mr. Githui, learned counsel for the Applicants, submitted that these facts and the averment of the 1st Respondent are the very foundation of the tort of "**passing off**". As the plaintiffs do not have a trade mark, the foundation of the tort (*of passing off*) is custom based on unregistered trademark. Counsel submitted that custom is of antiquity, dating to Roman times, was kept up, and developed by the Guilds in the Middle Ages in Europe, and preserved under the Trade Marks Act, (*Cap. 506 Laws of Kenya*). The Trademark Act tort of passing off is statutory where the business has registered a trade mark.

Counsel therefore submitted that the plaintiffs ought to be protected from theft of its machinery and collection of payments for goods manufactured by the plaintiffs. That was counsel's first leg of argument.

Counsel's second leg of argument concerned the conduct of the 1st Defendant/Respondent. Counsel submitted that conduct of the 1st Respondent was inequitable, that equity expects transparency in commercial operations and transactions, and equity has no pigeon holes or compartments.

Counsel submitted that under traditional forms of contract, the law looks at the offer, acceptance and capacity of the parties. However in equity the law looks at the conduct, and if equity deems any conduct inequitable it will order tracing of assets starved away under the guise of legitimacy.

On his part Mr. Kiburi strongly opposed the Application. While acknowledging that the three natural persons are all engaged in the three businesses, the issue or dispute is in respect of the 2nd Defendant in which the other two natural persons are not involved. In this respect, counsel submitted that the 2nd Defendant is an independent legal entity, and that this fact is not challenged.

I have already referred to this counsel's submission that the requirements of Order 40 of the Civil Procedure Rules 2010 had not been satisfied by the Applicant, and that the application before court was pre-emptive to prevent the Defendants from carrying on with its business, that there is no evidence, and the 1st Plaintiff has no cause of action, and the whole suit and application is a misjoinder of parties.

Counsel submitted that there is no allegation that the registration of either business was irregular to prevent the Defendants from trading in a business which is run from the premises owned by the 1st Respondent. There was also no evidence of drawing cheques from NIC Bank, and there had been no issues until the registration of the 2nd Defendant.

Counsel also re-emphasized his submission that as an independent entity the 2nd Defendant has a right to join any other entity or even being a competitor of the Applicants. It is not the business of the court, counsel submitted to preside over disagreements between directors, and that no injunction should issue.

Counsel added further that the 2nd Defendant does not even own the machinery, but the premises are owned by the 1st Defendant, and that he cannot be ejected from his own property.

Counsel also added that allegations of loss of money are matters of a separate cause of action, and that the transactions over which the 2nd Defendant was paid arose out of separate business transactions conducted by the 2nd Defendant, and no principles of equity were violated, that there was nothing opaque on the registration of the 2nd Defendant. On the other principles of granting injunction, there was no indication that the Defendants would be unable to compensate the Applicants, and that the balance of convenience lay with the Respondents.

For those reasons, Counsel urged the court to dismiss with costs the plaintiffs' application.

Those were the rival arguments. I set out in the subsequent paragraphs of this Ruling my considered opinion on the application, and the rival arguments, commencing with those of the Respondents' counsel.

There is no doubt that the 2nd Respondent is an independent legal entity, and whether or not the plaintiffs have a cause of action is a matter for a different application either to strike out the suit, or argument at the hearing of the principal suit, and has no significance at this interlocutory stage. This equally applies to the argument about misjoinder of parties.

Although there was no direct argument by counsel for the Applicant's as to whether the registration of the 2nd Respondent was regular, I certainly think it was very irregular. What in effect the Registrar of Companies did without reference to either Peter John Hewitt or James Ndungu Gachoka, the other owners of the business name **CROP KING FISH FEEDS** was to convert the business name into a limited company with another shareholder who was not an owner of the registered name. That certainly is contrary to the provisions of SS 6 & 7 of the Business Names Act, which require the consent of other owners of a business name before it is either transferred to another entity or converted into a company limited by shares. That however is a matter for determination on another day and time.

It is correct that an application for any injunctive orders is a pre-emptive action to restrain a defendant or defendants from pursuing a cause of action which is injurious to the interests of the plaintiffs such as the Applicants in this case.

Again allegations regarding the cashing or otherwise of cheques with NIC Bank is a matter for consideration at the hearing of the main suit but has a bearing in an application like this one, alleging malpractice on the part of the 1st Defendant personally, and as a director of the 1st Plaintiff and 2nd Defendant.

There is of course no doubt that as an independent entity, the 2nd Defendant has a right to join any other entity or even act as a competitor of the Applicants. That right is however constrained by the antecedent arrangements to the 2nd Defendant's incorporation. The 2nd Defendant was born out of existing arrangements between its main sponsor, the 1st Defendant, and the 2nd Plaintiffs or Applicants. It is therefore not free to act without reference to those arrangements. If it does so, both it, and 1st Respondent its sponsor, breach those arrangements with the 2nd Plaintiffs', and also the 1st Plaintiff as shareholder thereof.

It is very much the business of court to preside over and determine all disputes put before it by parties called litigants.

The ownership of machinery, (*probably the property of the plaintiffs*), is a matter in issue in considering applications such as this one, the subject of this Ruling. The location of the premises occupied by the management of the company (*not the ownership of the property*), is certainly a relevant consideration.

The question also of moneys paid as a result of business conducted by the 2nd Defendant is a matter at the heart of the Applicants' major argument of "**passing off**", the goods and transactions of the Respondents as if they were those of the Plaintiffs, and such conduct on the part of the 1st Respondent would certainly come into the equation as inequitable and opaque from the point of view of the Applicants. In such circumstances the balance of convenience, cannot possibly lie with the Respondents as counsel contended.

Turning to the Applicants' case, the issue is whether the Applicants established the necessary threshold for the grant of injunctive orders. In Kenya and East African jurisprudence, an applicant for injunctive orders must establish a prima facie case showing that unless the orders sought are granted, the applicant will suffer substantial loss which cannot be compensated in damages, and if there is any doubt in the eyes of the court, determine the application on the balance of convenience. These principles are to be found the *locus classicus* case of **GIELLA VS. CASSMAN BROWN & CO. LTD [1973] E.A. 358**.

To establish a prima facie case, the Applicants **firstly** claimed that the Respondents were guilty of the tort of "**passing off**", and **secondly** that the Respondents were guilty of inequitable conduct. I will consider each of these grounds in turn.

What is the "**tort of passing off**"? According to the authors of **Clerk and Lindsell on Tort**, 17th Edn. Chapter 25, para. 25.01, p. 1403 -

"it is an actionable wrong for a trader so to conduct his business as to lead to the belief that his goods, services or business are the goods or services or business of another. This is the tort of passing off."

In the case of **RECKITT & COLMAN PRODUCTS LTD VS. BORDEN INC. [1990] ALL ER 873**, Lord Oliver of Aylmerton said -

"It has been said that the law of passing off can be summarized in one short proposition - no man may pass off his goods as those of another."

The undisputed facts in this application as already outlined above, show that the 1st Defendant is not only a subscriber but also a substantial shareholder in the first Plaintiff. He along with **Peter John Hewitt** and **James Ndungu Kariuki** are co-owners of the business name Crop King Fish Feeds (*the 2nd plaintiff*). Unknown to these plaintiffs the 1st Respondent surreptitiously obtained the conversion of **Crop King Fish Feeds** into **Crop Fish Feeds Ltd**, a limited liability company. The 1st Defendant proceeded to conduct business under the name of the limited liability company as if it were the business name Crop King Fish Feeds and secured substantial business in that name. All that was done without notice or knowledge of the other owners of both the First plaintiff or the Second Plaintiff.

The actions of the 1st Defendant not only qualify as passing off, but also amount to inequitable conduct on his part. Inequitable conduct is conduct that lacks good faith, and acting without candour, borders on fraud and unclean hands. The ownership of the business name **Crop King Fish Feeds** was vested in the three owners, **Benson Maingi Kariuki**, **Peter John Hewitt** and **James Ndungu Gachoka** and not in **Benson Maingi Kariuki**. He could not act unilaterally and convert it into **Crop King Fish Feeds Ltd**. In doing so, he purported to take over the business and clientele of **Crop King Fish Feeds** without the knowledge of his co-proprietors of the business name. Worse still in conducting business in that new name he not only "**passed off**" the business of the Plaintiffs as that of the 2nd Defendant, but he also conducted himself inequitably by taking the proceeds of that business and hiding them away from the plaintiffs. There is therefore a prima facie case of both the tort of passing off, and inequitable conduct on the part of the 1st Defendant.

Counsel for the Respondents argued that no case was established that the Respondents would be unable to pay any damages to the plaintiffs should they succeed in their suit. **Firstly** there was indeed no suggestion that the 1st Respondent was a person of straw or that the 2nd Defendant is but a name and a shell without any assets to back it up. Even if the 1st Respondent were a person of means, and the 2nd Respondent were a company of substantial assets, the very existence of the 2nd Respondent is as a result of inequitable conduct on the part of the 1st Respondent, and **secondly** in light of the fact that the 2nd Respondent is a running business drawing on the good will of the plaintiffs, it would be difficult to establish the extent of the business and quantify the returns on the plaintiffs' capital equipment being employed by the Respondents. Consequently the plaintiffs are very likely to suffer substantial loss and damage.

Lastly, there was prayer 4 of the Application which neither Mr. Githui, learned counsel for the Applicants nor Mr. Kiburi learned counsel for the Respondent argued. It sought a mandatory injunction to compel the defendants to open the factory situate on KAMUZA BANDA STREET LR. No. 3 of 979, and grant the Applicants access to the factory to enable them continue operating.

A mandatory injunction is an affirmative direction to the Respondent to act or follow the course of conduct ordered.

The application herein was inter alia based upon the provisions of Section 1A and 1B, and 3A of the Civil Procedure Act, to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed under the Act, and for this purpose to make such orders as may be necessary for the ends of justice.

In my view the ends of justice demand that the factory do open forthwith to enable the production of necessary fish products.

In the scenarios described above, the balance would favour the plaintiffs. In the result therefore, I find and hold that the plaintiffs have established the necessary thresholds for the grant of injunctive orders.

For all those reasons, the application dated and filed on 7th December 2011 is allowed in terms of prayers 3, 4 and 5 thereof.

I direct that costs occasioned by this application be paid by the Defendants jointly and severally.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 23rd day of March, 2012

M. J. ANYARA EMUKULE
JUDGE